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No. 82-

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Supreme Court of the United States

OCTOBER TERM, 1982

LONN A. TROST,

Appellant,

v.

SUPERIOR COURT OF THE STATE OF
CALIFORNIA, COUNTY OF LOS ANGELES,

Appellee.

MANUEL L. ROTHBERG,

Real Party in Interest.

ON APPEAL FROM THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA

JURISDICTIONAL STATEMENT

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Question Presented

1. Whether Section 410.10 of the California Code of Civil Procedure, as construed to apply to the facts set forth herein, is violative of the Due Process Clause or the Fourteenth Amendment of the United States Constitution because it impermissibly allows California to exercise *in personam* jurisdiction over a non-resident attorney merely by alleging a fraudulent conspiracy between he and his client although that non-resident attorney has no contacts with the State of California.

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Opinions Below

On August 23, 1982, a Petition for a Hearing before the Supreme Court of the State of California was filed. The Petition was denied on September 22, 1982, without opinion and appears in the appendix hereto, p. 1a, *infra*.

On August 4, 1982, a Petition for Writ of Mandate was filed with the Court of Appeal of the State of California,

Second Appellate Division. The Writ of Mandate was denied on August 13, 1982, without opinion and appears in the appendix hereto, p. 2a, *infra*.

Appellant filed a Notice of Motion to Quash Service of Summons, a Declaration, and Memorandum of Points and Authorities on June 28, 1982, on the grounds that he is a non-resident of California and he has no contact upon which to base the exercise of jurisdiction by California. This motion was denied, without opinion, on July 26, 1982, and appears in the appendix hereto, p. 3a, *infra*.

Jurisdiction

Lonn A. Trost, the appellant, appeals from the final determination of the Supreme Court of the State of California, dated September 22, 1982, denying appellant permission for a Hearing in said Court, thereby upholding the constitutionality of California Code of Civil Procedure § 410.10 as applied in this case. On October 21, 1982, this Court, per Justice Rehnquist, granted a stay of this proceeding as it pertains to appellant in order to perfect an appeal to this court and receive a final determination in this matter. The stay was vacated on October 27, 1982 and as a result Trost was obligated to answer the complaint.

A notice of appeal to this Court was duly filed in the Court of Appeal of the State of California and the Superior Court, County of Los Angeles, on October 15, 1982. *See* appendix, p. 4a, *infra*.

This appeal is being docketed in this Court within 90 days from the denial of a Petition for Hearing below. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(2). A direct Appeal to this Court is proper in this case because the California Courts have construed § 410.10

so as to apply to appellant despite appellant's continued contention that such application is unconstitutional. This Court has consistently held that "a state statute is sustained within the meaning of § 1257(2) when a state court holds it applicable to a particular set of facts as against the contention that *such application* is invalid on federal grounds." *Japan Line Ltd. v. County of Los Angeles*, 441 U.S. 434, 441 (1979) (emphasis added). *See also Cohen v. California*, 403 U.S. 14, 17 (1971) (This Court held an "appeal" was properly taken where appellant consistently contended that "as construed to apply to the facts of this case" the state statute in question infringed on his constitutional rights.)

Constitutional Provisions and Statutes

- 1) Fourteenth Amendment, United States Constitution:
No state shall make or enforce any law which . . . shall . . . deprive any person of life, liberty, or property, without due process of law.
- 2) California Code of Civil Procedure Section 410.10:
A court of this state may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States.

* * * * *

Raising the Federal Question

At the earliest possible moment in this action, in his Memorandum of Points and Authorities in support of his Motion to Quash Service of Summons, appellant raised the claim that the exercise of personal jurisdiction over him would violate the Due Process Clause of the Fourteenth

Amendment to the United States Constitution. In denying appellant's motion without opinion, the Superior Court did not address the constitutional issue.

The constitutional claim was pressed by appellant in his Petition for a Writ of Mandate before the Court of Appeal of the State of California, Second Appellate Division. The Court of Appeal denied the Writ without opinion, so once again the constitutional claim was not addressed.

After being denied a Writ of Mandate, appellant submitted a Petition for a Hearing to the Supreme Court of the State of California in which appellant again pressed his constitutional claim. By denying appellant's Petition for a Hearing, the California Supreme Court rejected the federal constitutional claim and thereby denied appellant any further California forum in which to litigate these substantial questions.

Statement of the Case

This appeal involves a cross-complaint in an action commenced by W & J Sloane of Beverly Hills, Inc. ("Sloane"), a wholly-owned subsidiary of Beck Industries, Inc. ("Beck"), against Manuel F. Rothberg ("Rothberg"), wherein Sloane alleges that it has sustained damages due to Rothberg's breach of trust, and misappropriation of corporate funds (the "Action"). Rothberg filed a cross-complaint against Sloane, Stephen Kirschenbaum, in his capacity as Reorganization Trustee of Beck, Lonn A. Trost and Leonard Unger. Rothberg alleges fraud and wrongful discharge as against cross-defendant and appellant herein, Lonn A. Trost ("Trost").

Trost is a member of the New York law firm of Shea & Gould, which firm was by order of the United States

District Court for the Southern District of New York retained as general counsel to represent the Reorganization Trustee of Beck and as such represents Stephen Kirschenbaum in his capacity as Trustee of Beck (the "Trustee").

Trost has never been in California. Trost's domicile and residence are in the state of New Jersey. He is licensed to practice law in the state and federal courts of New York and he is not licensed to practice law in California. He has never owned any property in California, nor ever paid taxes in California. He has never conducted any business in California, nor ever conducted any business with a California resident.

Beck filed a petition for reorganization under Chapter X of the Bankruptcy Act on May 27, 1971 in the United States District Court of the Southern District of New York (the "Court"); that petition was approved by an order dated May 27, 1971. Stephen Kirschenbaum was duly appointed as successor Reorganization Trustee by order dated March 10, 1975 and is now acting as such Trustee.

Trost's firm and its predecessor firm have represented all the reorganization trustees since their initial appointments. Trost's representation of the Trustee, on behalf of Shea & Gould, has been limited to the rendering of legal advice and counsel to the reorganization trustees. Neither Trost nor his firm was ever a "business advisor" to the Trustee, as alleged in the cross-complaint.

Sloane is a wholly-owned subsidiary of Beck. On December 1, 1981, Trost received a telephone call from Rothberg, then the chief executive officer of Sloane, advising him, *inter alia*, that there was to be a meeting in the Trustee's office in New York City the following week. Rothberg also advised Trost of certain demands he was going to make or already had made upon the Trustee. Trost told Rothberg

that he was not aware of the prospective meeting or what was proposed to be discussed thereat, but that as the Trustee's counsel he would be there if required by the Trustee.

On December 9, 1981, a meeting was held in the Trustee's office in New York to discuss the sale of Sloan's major asset, its interest in its leases, and Trost was present as counsel to the Trustee to discuss the sale of the leases and review a proposed agreement therefore. Rothberg attended this meeting so as to introduce a prospective purchaser of the leases to the Trustee. Following the meeting, as Trost was leaving, Rothberg and the Trustee discussed Rothberg's role in the prospective liquidation of Sloane's remaining inventory. The Trustee was explaining to Rothberg that Rothberg would receive a percentage of the inventory sales rather than a flat "finder's fee" for his services. The Trustee then asked Trost whether any agreement which might be reached between the Trustee and Rothberg concerning the latter's role in the liquidation required Court approval. Trost initially tried to explain to Rothberg that what the Trustee was trying to say was that the payment of a finder's fee could not be authorized by the Trustee but if the Trustee and Rothberg could agree upon an amount to be paid to Rothberg, the two of them could structure a situation so that Rothberg would be in a position to receive an equivalent sum. Trost then advised the Trustee that while no Court approval was necessary, it would be appropriate, in order to ensure complete disclosure, that any prospective role by Rothberg be reflected in the court application pertaining to the sale of the leases. Trost then left the meeting as Rothberg and the Trustee continued their discussion.

Historically, in the Beck proceeding the Court has held hearings whenever there was to be, *inter alia*, either a transfer or sale of the stock or substantially all of the assets of any subsidiary of Beck. Thus, at the Trustee's direction,

an application (the "Application") was prepared and on December 24, 1981 submitted to the Court. On said date the Court directed all interested parties to show cause why the Court should not enter an order authorizing the Trustee "to take such appropriate action as may be necessary to cause Sloane to sell its interest in the [Sloane] leases, and authorizing a liquidation sale."

On January 11th and 12th, 1982 a hearing was held at which time a bid for the leases was received and the sale thereof was "confirmed to the extent it was within the authority of the Court to do so." (Transcript of Hearing on Order to Show Cause to Sell W & J Sloane, Beverly Hills, Cal. Lease before Hon. Edward J. Ryan, United States Bankruptcy Court, Southern District of New York, p. 22.) Subsequently, the Court signed an order authorizing the Trustee to take such appropriate action as necessary to cause Sloane to sell its interest in the lease.

Trost had no contact or other communication with Rothberg between December 9, 1981 and the present, aside from three or four brief telephone conversations, the last of which took place on February 18, 1982.

"The instant action was instituted against [Trost] . . . since . . . he would not consent to the taking of . . . his deposition" in connection with the action. This statement was made to United States Bankruptcy Judge Edward J. Ryan by Rothberg's own New York counsel Robert Rosenberg, Esq. of the law firm of Moses & Singer during a Chambers conference two months after the cross-complaint was served. However, on June 17, 1982, without appearing in the instant case or otherwise prejudicing any rights Trost may have had in connection with this cross-claim, he voluntarily appeared as a witness and was deposed by Mr. Rosenberg.

These are the circumstances in which California has attempted to assert personal jurisdiction over Trost.

Trost filed a Notice of Motion and Motion to Quash Service of the Summons, a Declaration, and Memorandum of Points and Authorities on June 28, 1982 on the ground that Trost did not have sufficient minimum contacts with California upon which to base the exercise of jurisdiction by California. On July 26, 1982, the Superior Court denied the motion to dismiss without opinion.

On August 4, 1982, a Petition for Writ of Mandate was filed with the Court of Appeal of the State of California, Second Appellate Division. The Writ of Mandate was denied on August 13, 1982.

On August 23, 1982, a Petition for a Hearing was submitted to the Supreme Court of the State of California. The Petition for a Hearing was denied on September 22, 1982.

On October 5, 1982, Trost, by special appearance, submitted an *ex parte* application to the California Superior Court seeking an order staying his time to respond to the Cross-Complaint until this Court ruled on his appeal or, alternatively, for an order extending his time to respond to the Cross-Complaint until this Court ruled on his appeal. The California Superior Court denied the motion to stay without prejudice to its renewal upon the filing of Petitioner's appeal to this Court.

On October 12, 1982, Trost, by special appearance, again submitted an application to the California Superior Court seeking an order staying his time to respond to the Cross-Complaint until this Court ruled on his appeal. Suggesting that the California Court of Appeal was the proper forum to issue the stay, the Superior Court denied Trost's

application so as to enable him to renew his application for a stay to said California Court of Appeal on or before October 22, 1982.

On October 15, 1982, a Notice of Appeal to the United States Supreme Court and an Application for a Stay were filed with the Court of Appeal of the State of California, Second Appellate Division. On October 19, 1982, the California Court of Appeal, Second Appellate Division, ruled that it was without jurisdiction to issue the stay requested.

On October 20, 1982, an Application for an Emergency Stay of the Superior Court proceedings was submitted to Justice William H. Rehnquist. Justice Rehnquist granted such stay on October 21, 1982, pending the receipt of response to the application and further order of either Justice Rehnquist or of this Court.

On October 27, 1982, Justice Rehnquist vacated the aforementioned stay upon receipt of Rothberg's response, without opinion.

Trost answered the cross-complaint on October 29, 1982.

Trost performed no activities and rendered no advice to the Trustee or Sloane in connection with either the commencement of the action by Sloane against Rothberg or Rothberg's dismissal. He only learned of the aforesaid events after they had occurred.

The Questions Are Substantial

Whether a state statute can be construed so as to permit the exercise of jurisdiction over a non-resident with no contacts with the forum state merely because fraud is alleged is a question of substantial constitutional implications. The precise question presented here has never been treated by this Court.

This Court has well established the principle that a proper exercise of *in personam* jurisdiction requires certain minimum contacts between the defendant and the forum state. In *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945), this Court held that "due process requires only that in order to subject a defendant to a judgment *in personam*, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend the traditional notions of fair play and substantial justice. . . ." This standard of "minimum contacts" has been the cornerstone of every personal jurisdiction issue to be decided by this Court, see *Rush v. Savchuk*, 444 U.S. 320, 332 (1980); *Shaffer v. Heitner*, 433 U.S. 186, 212 (1977), and the present action is no exception. Never before has this Court been faced with such an expansion of the due process limits placed on the exercise of *in personam* jurisdiction.

The constitutionality and expanse of Section 410.10 of the California Code of Civil Procedure as applied in the instant case were questions raised below. There have been no opinions issued by the California Courts in their denial of Trost's Motion to Quash and the appeals therefrom. Yet the alleged basis for jurisdiction herein becomes clear upon examination of the different "Bases of Judicial Jurisdiction over Individuals" as construed by the Judicial Council Comments on § 410.10 of The California Code of Civil Procedure:

- "(1) Presence
- (2) Domicil
- (3) Residence
- (4) Citizenship
- (5) Consent

- (6) Appearance
- (7) Doing Business in State
- (8) Doing an Act in State
- (9) Causing Effect in State by Act or Omission Elsewhere
- (10) Ownership, Use or Possession of Thing in State
- (11) Other Relationships"

It is immediately apparent that none of these bases can have any application to appellant-Trost except No. (9), the "effects test". The California "effects" or "foreseeability" test was addressed by this Court in *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 285 (1980) wherein the Court affirmed that certain minimum contacts are required in order to afford a constitutional bases for jurisdiction. *See also Kulko v. California Superior Court*, 436 U.S. 84, 97-98 (1978).

The petitioners in *World-Wide* were New York corporations sued in Oklahoma State Court by respondents to recover for personal injuries sustained in an automobile accident that occurred while respondents were driving through Oklahoma. Respondents were New York residents who purchased the automobile from petitioners in New York and the petitioners did no business in Oklahoma.

This Court found that the isolated incident upon which respondents cause of action was based was insufficient grounds upon which to exercise jurisdiction. The minimum contacts standard was not satisfied because of the lack of those affiliating circumstances which are a necessary predicate to any exercise of State Court jurisdiction.

Petitioners carry on no activity whatsoever in Oklahoma. They close no sales and perform no services there. They avail themselves of none of the privileges and benefits of Oklahoma law. They solicit no business there either through salespersons or through advertising reasonably calculated to reach the State. Nor does the record show that they regularly sell cars at wholesale or retail to Oklahoma customers or residents or that they indirectly, through others, serve or seek to serve the Oklahoma market. In short, respondents seek to base jurisdiction on one isolated occurrence and whatever inferences can be drawn therefrom. . . .

World-Wide, supra, 444 U.S. at 295.

Similarly, there are none of the "affiliating circumstances" which serve as a necessary predicate to an exercise of jurisdiction in this case. Trost carries on no activity whatsoever in California. He is not licensed to, and has never practiced law in California. He avails himself of none of the privileges and benefits of California law. Appellee seeks to base the exercise of jurisdiction on his allegation that appellant made misrepresentations at a meeting in New York City where he was present, on behalf of Shea & Gould, representing the Trustee in negotiations concerning the sale of Sloane's leases. More specifically it is alleged that Appellant told Appellee that he would receive 10% of the gross proceeds of the profits from Sloane's liquidation sale.

As previously discussed when Appellant Trost was leaving the meeting, Rothberg and the Trustee were having a separate discussion concerning Rothberg's role in the prospective liquidation of Sloane's remaining inventory. The Trustee was explaining to Rothberg that Rothberg would receive a percentage of the inventory sales rather than a

flat "finder's fee" for his services. The Trustee then asked Trost whether any agreement which might be reached between the Trustee and Rothberg concerning the latter's role in the liquidation required Court approval. Trost initially tried to explain to Rothberg that what the Trustee was trying to say was that the payment of a finder's fee could not be authorized by the Trustee but if the Trustee and Rothberg could agree upon an amount to be paid to Rothberg, the two of them could structure a situation so that Rothberg would be in a position to receive an equivalent sum. Trost then advised the Trustee that while no Court approval was necessary, it would be appropriate, in order to ensure complete disclosure, that any prospective role by Rothberg be reflected in the court application pertaining to the sale of the leases. Trost then left the meeting as Rothberg and the Trustee continued their discussion.

In this case, there are no allegations that Trost made any statements as to Rothberg's role in the liquidation sale on behalf of himself rather than as counsel for the Trustee.* There has been no evidence presented or referred to which even suggests that any representation made by Trost was false at all. Certainly, Appellant's presence at that New York meeting was not an affiliating circumstance such that it was foreseeable that Trost might be called into a California forum.

Additionally, this Court has recognized that the foreseeability that is critical to due process analysis "is that the defendant's conduct and connection with the forum State

* It does not even appear that Rothberg has stated a claim against Trost upon which relief could be granted. Even taking his allegations as true, as the Ninth Circuit Court of Appeals recently held in *Los Angeles Airways, Inc. v. Davis*, 687 F.2d 321 (9th Cir. Sept. 17, 1982), legal advice, rendered in good faith, is privileged and the attorney-advisor is immune from liability.

are such that he should *reasonably anticipate* being haled into Court there." *World-Wide, supra*, 444 U.S. at 286 (emphasis added). This is required in order to give "a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render him liable to suit." *Id. See Shaffer, supra*, 433 U.S. at 216. An attorney could certainly not reasonably anticipate that if he were to render legal advice to a client concerning a resident of a different state, that he could be forced to personally defend an action in that distant forum arising out of his client's independent transactions.

Appellant urges that the important due process concerns of reasonableness and fairness have been blatantly violated in the case at bar. Appellant here has had no contact nor sought any contact with California. Rather, Appellee Rothberg came to New York to solicit business for himself from the Trustee. At that time Trost rendered legal advice to the Trustee, his client, on whether the agreement between "the Trustee and Rothberg" would have to be court approved. He further explained to Rothberg what his client, the Trustee, proposed in the alleged agreement to pay Rothberg 10% of the proceeds of Sloane's liquidation sale. These are the actions upon which California is attempting to base personal jurisdiction over Trost. Thereafter, Rothberg proceeded to return to California and carry out his plans without Trost's knowledge at any step along the way. Otherwise stated, it seems that Rothberg's contacts with the forum were decisive in determining whether defendant had the requisite minimum contacts upon which to base jurisdiction. Such an approach is forbidden by *International Shoe* and its progeny. *See Rush, supra*, 444 U.S. at 332. As this Court aptly stated:

The unilateral activity of those who claim some relationship with a non-resident defendant cannot satisfy the requirement of contact with the forum State. The application of that rule will vary with the quality and nature of the defendant's activity, but it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.

Hanson v. Denckla, 357 U.S. 235, 253 (1958).

It is respectfully submitted that § 410.10, as construed by the California Courts to apply to the above circumstances, has so expanded the doctrine of minimum contacts that state lines are now irrelevant for jurisdictional purposes. Appellant urges this Court to reinstate some sense of order and predictability to the legal system that allows potential defendants to reasonably anticipate where their conduct may render them liable to suit and more specifically, to allow an attorney to give his educated legal advice without the burden of worrying about defending a retaliatory suit in a distant forum. Accordingly, the statute as construed should be declared unconstitutional under the Due Process Clause of the Fourteenth Amendment.

Conclusion

For these reasons, this Court should note probable jurisdiction of this appeal.

Respectfully submitted,

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